

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION

Robert Graham, Jr.,	)	C.A. No. 6:11-595-MBS-KFM
	)	
Petitioner,	)	
	)	
vs.	)	
	)	<b>ORDER AND OPINION</b>
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Robert Graham, Jr. (“Petitioner”) is a prisoner in custody of the South Carolina Department of Corrections. On March 16, 2011, Petitioner filed a pro se motion to set aside his November 7, 1997 state criminal conviction and sentence. Petitioner styled the action “Notice and Motion to Set Aside Judgment” and noted that the motion was being brought under Fed. R. Civ. P. 60(b)(1-5). In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c), D.S.C., the action was referred to United States Magistrate Judge Kevin F. McDonald for review.

On April 8, 2011, the Magistrate Judge ordered Petitioner to bring his action into proper form pursuant to 28 U.S.C. § 2254. The Magistrate Judge noted in his order that Petitioner was essentially challenging his underlying state conviction. The Magistrate Judge also noted that despite Petitioner’s attempt to file his action under Rule 60(b) of the Federal Rules of Civil Procedure, such motion is not applicable in this case. On April 18, 2011, Petitioner filed a motion to dismiss his case without prejudice so that he could exhaust state remedies. On April 21, 2011, the Magistrate Judge issued a Report and Recommendation in which he recommended that Petitioner’s motion to dismiss be granted.

Petitioner filed objections to the Magistrate Judge's Report and Recommendation in which he clarified that his original action was brought pursuant to Rule 60(b) and urged the court to grant relief. On February 15, 2012, the court denied Petitioner's motion to dismiss as moot based on the fact that in his objections, Petitioner asked the court to consider his action on the merits. Further, the court ordered Petitioner to bring his 28 U.S.C. § 2254 action into proper form within twenty-four days. In the order, the court noted that if Petitioner failed to bring the case into proper form, the case may be dismissed pursuant to Rule 41 of the Federal Rules of Civil Procedure for failure to comply with an order of the court. Petitioner failed to bring the case into proper form within the required time period. On March 14, 2012, Petitioner filed a reply to the court's order, where he instead argues that he has properly filed his case as a Rule 60(b) motion.

Accordingly, the court DISMISSES Petitioner's action without prejudice for failure to comply with an order of the court pursuant to Fed. R. Civ. P. 41.

**IT IS SO ORDERED.**

s/ Margaret B. Seymour  
Margaret B. Seymour  
Chief United States District Judge

April 10, 2012  
Columbia, South Carolina